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ORIGINAL ARTICLE

How statutory duties shape the decision making of an economic regulator: insights from the energy regulatory community, past and present

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Abstract

This article is concerned with how statutory duties structure regulatory decisions. Rather than focusing on the role of the courts, we explore statutory interpretation by a regulator as a quasi-autonomous exercise, with external influences and internal norms and customs. To investigate this further, we conducted a series of semi-structured elite interviews with senior members of the energy 'regulatory community', past and present. Energy regulation has been selected as a case study due to the controversies in recent years over the legitimate limits of economic regulation, as successive governments have imposed broader public interest goals on the regulator, resulting in a proliferation of statutory objectives. This increased complexity has arguably obscured the appropriate contours and rationales of economic regulation. Nevertheless, it is unrealistic to completely separate regulatory policy and politics.

1 | INTRODUCTION

This article is concerned with one core question: how do statutory duties structure agency decision making? We follow the approach of Mashaw, viewing an agency's interpretation as 'a legal practice

in its own right, with its own customs and normative constraints'.[1] While judicial interpretation necessarily influences regulatory decision making,[2] in substantive terms, this governs the outer bounds of agency autonomy; there remains a discretionary sphere for a regulator, where the duties require competing interests to be prioritized and often trade-offs between them to be made.

The regulator that is the subject of this inquiry is the Office of Gas and Electricity Markets (Ofgem). Economic regulation is often viewed as an essentially 'technocratic' task, with expert decisions being taken away from the glare of politics.[3] Energy regulation, by way of contrast, has been the subject of particular controversy over the past decade. At the core of policy lies the 'energy trilemma', where the regulator (and government) seek to advance three key objectives – security of supply, environmental protection, and affordability – that are often in conflict with one another. It is also highly politicized, resulting in no small measure from rising prices and increased industry concentration. This has led to a number of developments in recent years, including the market investigation by the Competition and Markets Authority (CMA)[4] and the passing of primary legislation by the May Government *requiring* the regulator to impose a price cap on the most expensive default residential tariffs, reversing a longstanding policy in favour of liberalization.[5]

Such *direct* policy interventions by government are the exception rather than the norm. What we have witnessed instead is a tendency of governments over time to amend the regulator's statutory objectives in order to influence the direction and scope of regulatory policy. Since the privatization of the United Kingdom (UK) gas and electricity industries in the mid- to late 1980s, there have been frequent revisions of the regulator's statutory mandate, leading to questions over the 'credibility' of the regulator (and the regulatory regime).[6] Furthermore, across all sectors, and in this one in particular, criticisms have been levelled at governments for the imposition of complex, prolix, and contradictory objectives, often requiring regulators to make choices of an essentially political character, leading 'agencies into high policy by the backdoor'.[7] To address these issues, and the challenges that they pose for regulators, we conducted a number of interviews with senior members of the energy 'regulatory community', past and present. These provide us with unique insights into how statutory duties structure a regulator's decision making in practice.

This article is divided into five sections (including this one). The next section explains the statutory objectives and how they have changed materially over time, as well as providing an overview of significant institutional changes. The third section reviews the criticisms that have been made of the statutory duties for economic regulators generally, and the energy regulator in particular. The fourth section forms the empirical backbone of the article. There we present the

[1] J. L. Mashaw, 'Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise' (2005) 55 *University of Toronto Law J*. 497, at 500. His contribution is concerned mainly with the United States.

[2] See R. Rawlings, 'Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory' in *The Regulatory State: Constitutional Implications*, eds D. Oliver et al. (2010) 283; C. Scott, 'The Juridification of Regulatory Relations in the UK Utilities Sector' in *Commercial Regulation and Judicial Review*, eds J. Black et al. (1998) 19.

[3] G. Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *J. of Public Policy* 139; M. Thatcher and A. Stone Sweet, 'Theory and Practice of Delegation to Nonmajoritarian Institutions' (2002) 25 *West European Politics* 1.

[4] CMA, *Energy Market Investigation: Final Report* (2016), at <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>.

[5] Domestic Gas and Electricity (Tariff Cap) Act 2018.

[6] D. Coen and M. Thatcher, 'The New Governance of Markets and Non-Majoritarian Regulators' (2005) 18 *Governance* 329, at 339.

[7] P. Tucker, *Unelected Power* (2008) 345.

analysis of the interview data, prefaced with an explanation of our methodology. The fifth section concludes.

2 | THE STATUTORY DUTIES OF THE ENERGY REGULATOR

The statutory objectives of the regulator can be likened to 'terms of delegation'.[8] In other words, they structure the discretion of the regulator in the exercise of the statutory powers entrusted to it by Parliament.[9] For Ofgem, these are primarily the setting of consumer standards,[10] licensing functions (to grant,[11] modify,[12] and enforce licence conditions[13]), and other enforcement powers, including the imposition of financial penalties.[14]

The duties are 'standards' rather than rules.[15] They are often open ended, containing evaluative terms (such as 'reasonable demand'), framed subjectively, and using permissive language.[16] Some of the objectives are very broad, or 'high level', so as not to impose specific obligations, making it only 'necessary to consider whether, at a high level of abstraction, what is being proposed is consistent with these high-level standards'.[17] Various duties enumerate interests to be protected or aims to be secured, while some are identified as taking precedence over others.[18]

It is necessary to distinguish between two uses of discretion: first, identifying and interpreting statutory purposes; and second, choosing 'the policies, standards, and procedures to be followed in achieving these purposes'.[19] It is the first type, and the *interpretative* autonomy of the regulator, that concerns us here.

What follows in this section is an explanation of the statutory duties as they currently stand, with some background to the specific meaning attached to some of the key terms, especially highlighting potential ambiguities and conflicts between different substantive goals. This is not intended to be comprehensive; rather, it reinforces the point that the duties, albeit highly

[8] D. J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1990) 292.

[9] The statutory objectives of the regulator are expressed as its 'general duties': see House of Lords Select Committee on Regulators, *UK Economic Regulators* (2007) HL 189-I, paras 27–28, at <https://publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf>.

[10] Gas Act 1986, ss 33A–33E; Electricity Act 1989, ss 39–42C.

[11] Gas Act 1986, s. 7; Electricity Act 1989, s. 6.

[12] Gas Act 1986, ss 23–23G and sch. 4; Electricity Act 1989, ss 11A–11H and sch. 5.

[13] Gas Act 1986, ss 28–30O; Electricity Act 1989, ss 25–27O.

[14] Gas Act 1986, s. 30A; Electricity Act 1989, s. 27A. The regulator also has other powers, including to enforce competition law (concurrently with the CMA), although in the exercise of these functions, the statutory duties do not apply: Gas Act 1986, s. 36A; Electricity Act 1989, s. 43.

[15] For a critical discussion, see J. Black, *Rules and Regulators* (1997) 24–29. On the importance of rule-based discretion, see A. McHarg, 'Administrative Discretion, Administrative Rule-Making, and Judicial Review' (2017) 70 *Current Legal Problems* 267.

[16] On the use of permissive language and its ambiguity, see A. Samuels, '"May" and "Shall" and "Must": Power or Duty?' (2020) 41 *Statute Law Rev*. 89.

[17] D. Feldman, 'Legislation Which Bears No Law' (2016) 37 *Statute Law Rev*. 212, at 220.

[18] C. Graham, *Regulating Public Utilities: A Constitutional Approach* (2000) 27.

[19] Galligan, op. cit., n. 8, p. 22.

specified, leave the regulator with significant autonomy in interpreting its objectives.[20] We then go on to consider briefly the role of the courts in scrutinizing the regulator's interpretation of its duties, thereby defining the outer limits of its discretion. As we will see, the courts have consistently granted economic regulators a broad range of choices in their interpretation of objectives; there is rarely a 'right answer'.[21] Finally, we briefly chart the development of the duties over the last three decades, explaining their evolution against the backdrop of a changing institutional and policy environment.

2.1 | The current statutory objectives

The following sub-section offers an explanation of the statutory objectives of the energy regulator as they currently exist in the legislation – that is, the Gas Act 1986 and the Electricity Act 1989.[22]

They are organized according to a hierarchy of both objectives and interests. First and foremost, they prescribe that, in carrying out its functions, the 'principal objective' of the regulator is to '*protect* the interests of existing and future consumers'.[23] Those interests are to be 'taken as a whole' but include inter alia their interests in the reduction of greenhouse gas emissions together with security of supply.[24] The principal objective, originally inserted by the Utilities Act 2000, has been clarified and augmented on several occasions.

The duties also provide that the regulator 'shall have regard to' the interests of particular classes of consumers (those who are disabled or chronically sick, of pensionable age, or on low incomes, and individuals residing in rural areas), although this 'is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer'.[25] This reflects a long tradition of policies aimed at securing vulnerable consumers' access to affordable household energy.[26]

There is 'no simple and universal answer to what is in the interests of consumers', nor a single model of consumer, and there is often a choice for the regulator on how best to protect their collective interests.[27] The duties reflect the potential tensions in choosing between market mechanisms and interventions aimed at protecting consumers (or particular groups of consumers). The statutes require that the regulator 'shall carry out [its] functions … in the manner which [it] considers is best calculated to further the principal objective, *wherever appropriate* by promoting *effective* competition'.[28] However, there is now an additional qualification that '[b]efore deciding to carry out functions … in a particular manner with a view to promoting competition', the regulator 'shall consider' the extent to which the interests of consumers would be protected and 'whether

[20] For the most recent explanation of the statutory duties for Ofgem, see T. Prosser, *The Regulatory Enterprise* (2010) 184–185.

[21] Galligan, op. cit., n. 8, pp. 17–18.

[22] Gas Act 1986, s. 4AA; Electricity Act 1989, s. 3A.

[23] Gas Act 1986, s. 4AA(1), emphasis added; Electricity Act 1989, s. 3A(1), emphasis added.

[24] Gas Act 1986, s. 4AA(1A); Electricity Act 1989, s. 3A(1A).

[25] Gas Act 1986, s. 4AA(3); Electricity Act 1989, s. 3A(3).

[26] For examples of such policies, see C. Graham, 'Socio-Economic Rights and Essential Service: A New Challenge for the Regulatory State' in eds Oliver et al., op. cit., n. 2, p. 157, at pp. 161–164. For an explanation of the regulator's more recent interventions and its future plans, see Ofgem, *Consumer Vulnerability Strategy 2025* (2019), at <https://www.ofgem.gov.uk/publications/consumer-vulnerability-strategy-2025>.

[27] T. Prosser, 'Theorising Utility Regulation' (1999) 62 *Modern Law Rev*. 196, at 200.

[28] Gas Act 1986, s .4AA(1B), emphasis added; Electricity Act 1989, s. 3A(1B), emphasis added.

there is any other manner … whether or not it would promote competition' that 'would better protect those interests'.[29]

The professed aim of this tortuous provision, inserted by the Energy Act 2010,[30] is to ensure that where Ofgem is considering how to promote the interests of consumers, consumer protection measures are to be given more weight and priority than had previously been the case, especially where market-orientated measures would take longer to deliver results.[31] Often suggested as 'downrating' competition, we discuss this controversial provision below. For the time being, it is sufficient to note that it aims to qualify the term 'appropriate', making clear that the regulator is always required to consider alternatives to competition as the means of achieving the principal objective.

A further dimension to the definition of the consumer interest, ensuring security of supply, may also lead to tensions between objectives. It was introduced under the Energy Act 2010,[32] surprisingly late given its centrality to the provision of an essential service.[33] Indeed, a recent Secretary of State, Greg Clark MP, described it as the 'sine qua non' of energy policy, and the 'first duty' of any responsible minister.[34] The core dilemma here concerns the appropriate level of 'spare' capacity provided by firms in order to meet any 'excess' demand, the provision of which requires higher levels of investment and, ultimately, increased prices for consumers.[35]

Subject to the principal objective, the duties require that the regulator 'should have regard to' three further objectives.[36] First is the need to secure that all reasonable demand is met.[37] This is equivalent to a universal service requirement, reflecting the vital interests of consumers in being supplied with energy.[38] This is mirrored by a duty on firms to connect consumers.[39] Second is the need to secure that licensees are in a position to finance their statutory obligations. This duty is most relevant where Ofgem sets a price control, taking into account the need for the firm to earn a reasonable rate of return on its assets. Initially, this duty was thought by some to be in place to protect the shareholders of regulated firms, giving their interests priority over those of consumers.[40] This apparent subordination of consumers within the hierarchy of the original duties was always controversial, not least because it ran contrary to claims made by some that the protection of

[29] Gas Act 1986, s .4AA(1C); Electricity Act 1989, s. 3A(1C).

[30] Energy Act 2010, ss 16–17.

[31] Energy Bill Deb, 19 January 2010, col. 307 (Joan Ruddock MP, the then Energy Minister), at <https://publications.parliament.uk/pa/cm200910/cmpublic/energy/100119/am/100119s06.htm>.

[32] Energy Act 2010, ss 16 and 17 (for gas and electricity respectively).

[33] For an overview of security of supply measures, see CMA, op. cit., n. 4, Appendix 2, paras 126 et seq.

[34] House of Lords Select Committee on Economic Affairs, *The Price of Power: Reforming the Electricity Market* (2017) HL Paper 113, para. 57, at <https://publications.parliament.uk/pa/ld201617/ldselect/ldeconaf/113/113.pdf>.

[35] For a critique that insufficient weight has been given to incentives to invest, at the expense of security of supply, see D. Helm, 'Energy Policy: Security of Supply, Sustainability and Competition' (2002) 30 *Energy Policy* 173; id., paras 122–126.

[36] Gas Act 1986, s. 4AA(2); Electricity Act 1989, s. 3A(2).

[37] For gas, this is subject to the caveat 'so far as it is economical to do so', reflecting the fact that the gas network does not cover the whole of Great Britain: Gas Act 1986, s. 4AA(2)(a).

[38] For more detail, see T. Prosser, *Law and the Regulators* (1997) 20–21; Graham, op. cit., n. 18, p. 28.

[39] Gas Act 1986, s. 10; Electricity Act 1989, s. 16; Graham, id., p. 28. On the extent of this requirement, see *Norweb Plc* v. *Dixon* [1995] 3 All ER 952.

[40] J. Ernst, *Whose Utility? The Social Impact of Public Utility Privatization and Regulation in Britain* (1994) 60. For an argument to the contrary, see Prosser, op. cit., n. 38, pp. 20–21.

consumers was the primary rationale for regulation.[41] Furthermore, given that the interests of consumers would not be served were companies unable to provide reliable and high-quality services to them, nor if they were unable to invest sufficiently in network infrastructure, the finance duty and the consumer interest are to some extent complementary.[42] With the principal objective, it is now clear that the finance duty is subsidiary to the consumer interest (although the latter now includes security of supply).[43] The third duty, at this point in the hierarchy, is a requirement on the regulator to have regard to the need 'to contribute to sustainable development'.[44] This is perhaps the most open ended of all of the duties, criticized as being particularly vague and subjective[45] (something on which we reflect later).[46] While the then Government was initially resistant to the adoption of this duty,[47] the 2007 Energy White Paper carved out a specific role for Ofgem in promoting sustainable development.[48] In many ways, the statutory objectives of the regulator already captured many of the sustainable development goals relevant to energy policy (especially affordability, carbon reduction, and energy security).[49]

Subject to all of the foregoing duties, the legislation further requires that the regulator carries out its functions in 'the manner which … it considers is best calculated' to promote efficiency and economy on the part of licensees, protect the safety of the public, and 'secure a diverse and viable long-term energy supply', while also having regard to the environmental effects of regulated activities.[50] The first of these is hardly surprising, especially given the role of the regulator in controlling the pricing of the natural monopoly elements of the gas and electricity industries. There was perceived to be a danger that regulated firms would seek to over-invest or 'gold-plate' their assets, and one of the attractions of the model of price regulation adopted in the UK is the incentive that it offers to firms to maximize cost efficiencies.[51] To this end, the promotion of efficiency provides an important counterpoint to the finance duty above. Security of supply also features here, as do environmental objectives, although both already appear higher in the hierarchy.

[41] Graham, op. cit., n. 18, pp. 29–30.

[42] Id., p. 28.

[43] It should also be noted that Ofgem has powers to revoke a supplier's licence and appoint a 'supplier of last resort' where a firm is in financial difficulties.

[44] See Prosser, op. cit., n. 20, pp. 193–194.

[45] I. Bartle and P. Vass, 'Independent Economic Regulation: A Reassessment of Its Role in Sustainable Development' (2007) 15 *Utilities Policy* 261.

[46] For a useful discussion, especially concerning the ambiguity of the term, see A. Ross, 'Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes' (2008) 20 *J. of Environmental Law* 35.

[47] For a detailed discussion of the legislative background, and of the initial resistance of the then Government to the inclusion of the duty under the Energy Act 2004, see G. Owen, 'Sustainable Development Duties: New Roles for UK Economic Regulators' (2006) 14 *Utilities Policy* 208.

[48] Department of Trade and Industry, *Meeting the Energy Challenge: A White Paper on Energy* (2007; Cm. 7124) 126, at <https://www.gov.uk/government/publications/meeting-the-energy-challenge-a-white-paper-on-energy>.

[49] Up until recently, Ofgem had in place a Sustainable Development Advisory Group to offer advice on how it should operationalize its duty.

[50] Gas Act 1986, s. 4AA(5); Electricity Act 1989, s. 3A(5).

[51] For a succinct explanation, see R. Baldwin et al., *Understanding Regulation* (2012, 2nd edn) 478–490; Prosser, op. cit., n. 38, pp. 7–9.

2.2 | The judicial control of the statutory duties: the outer limits of autonomy

While the statutory duties are very open textured, the exercise of discretion conferred by them is subject to control, not least by the requirement of rationality.[52] However, as Rawlings put it, judicial review in this area is 'commonly of strictly limited significance', part of a 'bigger picture of multiple accountabilities'.[53] The judicial supervision of the exercise of the economic regulators' interpretative discretion is very limited.[54]

A useful starting point on the interpretative discretion of expert agencies is the *South Yorkshire Transport* case.[55] According to the House of Lords, where a statutory term is open to a spectrum of possible meanings, the role of the reviewing court is limited to determining whether the meaning assigned to the term is 'so aberrant that it cannot be classed as rational'.[56] Similarly, in *SeaFrance*,[57] the Supreme Court reiterated the need for 'caution' in overturning economic judgments of expert authorities in the construction of statutory provisions.[58]

There are only handful of cases where the courts have dealt with the latitude that economic regulators have in the *interpretation* of statutory duties. To take an illustrative case, in *T-Mobile*,[59] the correct construction of 'reasonable demand' under the Telecommunications Act 1984 was central to the dispute.[60] The point of contention was whether the term required a charging structure that *maximized* demand and thus economic efficiency.[61] While accepting that the question of whether demand was 'reasonable' was an objective one,[62] Moses J (as he was then) observed:

[52] Galligan, op. cit., n. 8, pp. 5–6.

[53] Rawlings, op. cit., n. 2, p. 286. We abstract here from a consideration of European Union (EU) law that has had an increasing influence over standards of review; for a discussion, see Rawlings, id., pp. 294–298. There are a number of limited areas where an appeal lies from Ofgem to the Competition Appeal Tribunal (CAT). For a full list, see Competition Appeal Tribunal, 'About' *Competition Appeal Tribunal*, at <https://www.catribunal.org.uk/about>.

[54] For a useful and more comprehensive summary of the case law, see A. Lidbetter, 'Commercial Regulation: Judicial Review: Hardly Looking or Looking Hard?' (2016) 21 *Judicial Rev*. 31; Rawlings, op. cit., n. 2, pp. 288–291.

[55] *R* v. *Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23. The case concerned the meaning of a 'substantial part of the United Kingdom' under the Fair Trading Act 1973, s. 64, a jurisdictional question of fact.

[56] Id., p. 32 (per Lord Mustill).

[57] *Société Coopérative de Production SeaFrance SA* v. *Competition Markets Authority* [2015] UKSC 75. In this case, the question was whether a 'relevant merger situation' had been created within the meaning of the Enterprise Act 2002.

[58] Id., [31], [44] (per Lord Sumption with Lords Neuberger, Clarke, Reed, and Hodge agreeing).

[59] *R (T-Mobile (UK) Ltd)* v. *Competition Commission* [2003] EWHC 1566 (Admin).

[60] Telecommunications Act 1984, s. 3(1)(a) (now repealed). While the regime for the regulation of electronic communications, based largely on (retained) EU law, has changed significantly (including with the provision of an appeal on the merits to the CAT), the deferential approach to the construction of duties remains intact. See *Everything Everywhere Limited* v. *Competition Commission* [2013] EWCA Civ 154 [35]–[39] (per Moses LJ); Lidbetter, op. cit., n. 54, pp. 41–42.

[61] The case concerned the decision of the regulator and the Competition Commission to impose a price cap on mobile phone call termination charges. The mobile phone companies claimed that in order to maximize economic efficiency, fixed costs should be allocated in inverse proportion to elasticity of demand, thereby maximizing demand in accordance with the duty, an outcome that the price cap prevented. The Commission, on the other hand, argued that it was entitled to take into account issues such as equity and fairness in the construction of the duty.

[62] *T-Mobile*, op. cit., n. 59, [116], citing *R* v. *The Director General of Telecommunications ex parte Cellcom Ltd* [1999] ECC 314, at 330 (per Lightman J).

> The question … depends, as it seems to me, on many factors. I reject the notion that it has one particular meaning, namely to maximize economic efficiency. In particular I reject the notion that the question … can be answered by the application of a definition applicable in every case. In short, the question is not 'hard-edged'.[63]

It had also been argued that the term 'best calculated' required economic efficiency to be placed above equity and fairness, a contention that the judge also rejected.[64]

To take another example, in *Welsh Water*,[65] the dispute turned on Ofwat's construction of its duty to 'promote effective competition'.[66] In permitting new entrants ('inset appointments') to compete with the incumbent, the regulator argued that it merely had to demonstrate that consumers (including those of the incumbent) would be no worse off as a result. Welsh Water, on the other hand, argued that Ofwat was further required to demonstrate that the inset appointee would provide a more beneficial service to its customers. In rejecting the latter construction, Mitting J observed that, subject to the requirement of rationality, the 'expert regulator' enjoyed a 'generous range' in deciding how to fulfil a statutory objective.[67]

These two cases demonstrate the high degree of autonomy that economic regulators, including Ofgem, enjoy in the interpretation of their statutory objectives.[68] They underline the importance of understanding the way in which a regulator defines its mandate as a distinct 'interpretative community'.[69] That is the central purpose of this article.

2.3 | The evolution of the statutory objectives: from privatization to 'bringing the state back in'

Changes to the statutory duties are often motivated by the perception that insufficient weight is being attached to certain objectives, or the interests of particular groups of consumers, within the hierarchy of duties. With respect to energy policy, the development of the statutory duties can be divided into three broad phases, summarized in Figure 1.

Although the motivations underlying the Thatcher Government's privatization of the utilities industries in the 1980s were numerous,[70] economic efficiency, principally by the gradual introduction of competition, is often described as the core regulatory objective.

In the first phase, the duties for gas and electricity followed a standard model, with the regulators (then the Directors General for Gas and Electricity Supply) subject to two primary duties:

[63] Id., [118].

[64] Id., [124].

[65] *R (Welsh Water)* v. *OFWAT* [2009] EWHC 3493 (Admin).

[66] Water Industry Act 1991, s. 2(2B). While the duties are similar, the structure of the water industry is very different, with only very limited competition, mainly with respect to new developments.

[67] *Welsh Water*, op. cit., n. 65, [21].

[68] In *Marcic*, the House of Lords reiterated the wide discretion that the (water) regulator has in deciding upon how to prioritize its statutory objectives, even where Convention rights are engaged: *Marcic* v. *Thames Water Utilities* [2003] UKHL 66; [2004] 2 AC 42 [65]–[70] (per Lord Hoffman), [77] (per Lord Hope); see Prosser, op. cit., n. 20, pp. 81–82, p. 190.

[69] As Galligan observes, there are two such communities, judges and administrative officials, each with their own concerns and constraints: Galligan, op. cit., n. 8, pp. 294–295.

[70] J. A. Kay and D. J. Thompson, 'Privatisation: A Policy in Search of a Rationale' (1986) 96 *The Economic J*. 18, at 19.

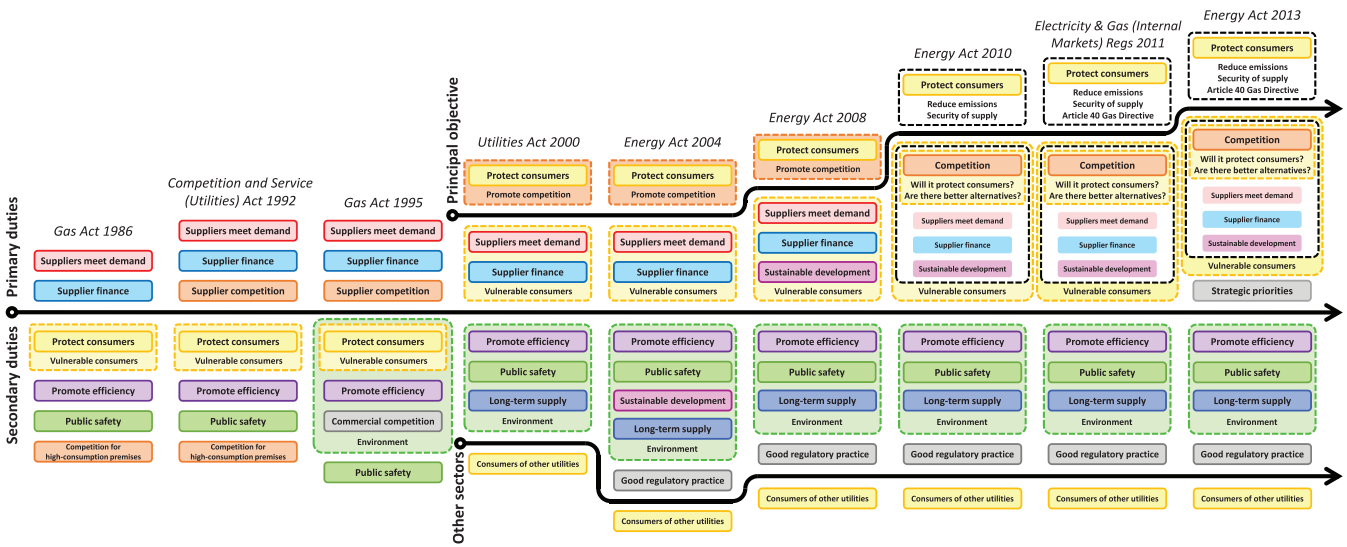

FIGURE 1 Illustrative guide to evolving statutory duties

Note: While this relates to the Gas Act 1986, the duties under the Electricity Act 1989 are broadly similar. The material differences were removed with the enactment of Gas Act 1995, s. 1.

to secure both reasonable demand and the financing of the regulated firms.[71] In addition, the Electricity Act 1989 also contained a further primary duty to promote effective competition; the Gas Act 1986 was brought into alignment in 1992 and 1995.[72] The regulators also had a number of secondary duties, including protecting the interests of consumers in respect of prices and other contract terms, continuity of supply, and quality. As part of this consumer duty, specific vulnerable groups were highlighted for particular attention in respect of certain aspects of supply.

Despite the relative simplicity of the duties, there was significant debate over the relative weight to be given to social and distributional matters.[73] Nevertheless, this model remained largely stable for over a decade, eventually facilitating the complete removal of residential price caps.[74] Due to the focus on competition *as a matter of regulatory policy*, many consider this period of regulation to have been a success given, inter alia, the rate at which the gas and electricity markets became more competitive.[75]

The next phase in the evolution of the duties began in 1997, with the election of 'New Labour', who had been arguing in opposition for a greater emphasis to be placed on the interests of consumers generally, and of disadvantaged consumers in particular. The 1998 Green Paper *A Fair Deal for Consumers*[76] contained a number of reform proposals that were implemented under the Utilities Act 2000. The existing statutory duties were encompassed within a 'principal objective' to protect the interests of consumers 'wherever *appropriate* by promoting effective competition'.[77] This carefully crafted provision apparently gave precedence to market-based measures over more interventionist consumer protection initiatives.

Further duties were added, notably to secure a 'viable and long-term energy supply'.[78] In addition, vulnerable classes of consumers, to whose interests the regulator had to have particular regard, were extended to include the chronically sick and those on low incomes in respect of all aspects of supply, not just quality (as had previously been the case).[79]

The Utilities Act also made important changes to the institutional framework. First, the Directors General were replaced by a single regulatory board, the Gas and Electricity Markets Authority (GEMA).[80] The new authority would be supported by Ofgem (resulting from the merger of Ofgas and OFFER).[81] There was a perception that the Director General model tended towards strong and personalized decision making, whereas the collegiate nature of the board system was viewed

[71] Gas Act 1986, s. 4(1) (repealed); Electricity Act 1989, s. 3(1) (repealed). For more detail, see Prosser, op. cit., n. 38, pp. 97–101 (for gas), pp. 159–166 (for electricity).

[72] Competition and Services (Utilities) Act 1992, s. 38(1) (repealed); Gas Act 1995, s. 1 (repealed).

[73] Prosser, op. cit., n. 38, p. 19; Graham, op. cit., n. 18, p. 28; Ernst, op. cit., n. 40, p. 61.

[74] For the background on this, see M. Harker and C. Waddams, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' (2007) May *J. of Business Law* 244.

[75] C. Robinson, 'Energy Policy: A Full Circle?' in *Handbook on Energy and Climate Change*, ed. R. Fouquet (2013) 274.

[76] Department of Trade and Industry, *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation* (1998, Cm. 3898).

[77] Utilities Act 2000, ss 9 and 13 (inserting, respectively, Gas Act 1986, s. 4AA and Electricity Act 1989, s. 3A), emphasis added.

[78] Gas Act 1986, s. 4AA(5); Electricity Act 1989, s. 3A(5).

[79] Gas Act 1986, s. 4AA(3); Electricity Act 1989, s. 3A(3).

[80] Utilities Act 2000, s. 1.

[81] For the remainder of this article, 'Ofgem' will be used to refer to the regulator, and 'GEMA' only where context requires.

as more stable, introducing a broader range of expertise.[82] Furthermore, as foreshadowed by the Green Paper, a statutory power for the Secretary of State to issue guidance marked another important change, signalling a new intent on the part of government to steer the regulator in pursuit of social and environmental goals.[83]

The third phase in the evolution of the duties is best characterized by concerns over security of supply and rising prices (leading ultimately to the CMA inquiry) and an increasing emphasis on environmental policy (especially with challenging EU targets for renewables). The creation of the Department of Energy and Climate Change (DECC) in 2008 was accompanied by successive Energy Acts in 2008, 2010, and 2013, heralding substantial government investment in carbon-reducing infrastructure, and culminating in the electricity market reform package in 2013.[84]

While not the central motivation for legislating, each time an act was passed, the regulator's statutory objectives were augmented, highlighting the increasing importance of environmental goals within the trilemma. For example, sustainable development was introduced in 2004[85] and elevated to a primary duty in 2008.[86] At the same time, the principal objective was amended to include the protection of future as well as existing consumers.[87] The Energy Act 2010 also made further subtle changes, specifying that the interests of existing and future consumers should be defined to include their interests in both the reduction of greenhouse gas emissions and security of supply.[88] One of the most contentious changes under the 2010 Act was the amendment to Ofgem's principal objective and an apparent 'downrating' of competition (discussed above).

The Energy Act 2013 strengthened the powers of government to issue guidance on the regulator's specific policy objectives (to which we return below).[89] Finally, the May Government passed legislation requiring Ofgem to impose a price control on the most expensive residential tariffs. This ran counter to the view of the CMA that a general price cap would 'undermine the competitive process',[90] while the then Chief Executive Officer (CEO) of Ofgem stated that it could not be pursued by the regulator without a new legislative mandate.[91]

What we witness across these three phases, then, are adjustments to the statutory duties to reflect changes that successive governments gave to priorities within the trilemma, providing

[82] Baldwin et al., op. cit., n. 51, p. 342.

[83] Utilities Act 2000, ss 10 and 14.

[84] F. Kern et al., 'Measuring and Explaining Policy Paradigm Change: The Case of UK Energy Policy' (2014) 42 *Policy & Politics* 513; M. Pollit and A. Brophy Haney, 'Dismantling a Competitive Electricity Sector: The UK's Electricity Market Reform' (2013) 26 *The Electricity J*. 8.

[85] Energy Act 2004, s. 83.

[86] Energy Act 2008, s. 83(1).

[87] Energy Act 2008, s. 83(2). This amendment was otiose as this definition of consumer had already been made by Utilities Act 2000, ss 9 and 13 (inserting, respectively, Gas Act 1986, s. 4AA(6) and Electricity Act 1989, s. 3A(6)).

[88] Energy Act 2010, ss 16 and 17. Further minor changes were made to the duties in 2011, to align them with obligations under the EU's Third Energy Package: The Electricity and Gas (Internal Markets) Regulations 2011, SI 2011/2704, arts. 26 and 27.

[89] Energy Act 2013, s. 131.

[90] CMA, op. cit., n. 4, para. 11.86. This was the decision of the majority group, with a dissent by Martin Cave (id., p. 1415). However, the CMA did decide that a price cap should be imposed for the benefit of certain classes of vulnerable consumers.

[91] House of Commons Business, Energy and Industrial Strategy Committee, *Oral Evidence: CMA's Investigation of the UK Energy Market* (2017) HC 982, Q153.

greater protection to consumers, with less emphasis on competition, and attaching progressively more weight to environmental objectives. We now turn to some of the criticisms that have been levelled at the duties: can they in their current form effectively guide regulatory decision making, and is their substantive content appropriate?

3 | THE REGULATORY DUTIES: COMPLEXITY, INCOHERENCE, AND CHALLENGES TO THE 'ORTHODOX' PARADIGM?

The increasing complexity and perceived incoherence of regulators' statutory duties has been the subject of increasing attention. In 2004, the House of Lords Select Committee on the Constitution reflected on the issue, noting 'that poor statutory design, such as excessive, or contradictory, lists of statutory duties placed on the regulators' can lead to incoherent policies.[92] Similarly, in 2007, the House of Lords Select Committee on Regulators opined that 'matters of social equity and distributive justice are often best addressed, essentially by Government and Parliament, through other means such as the tax system'.[93]

The 2010–2015 Coalition Government appeared to concur.[94] The Department of Business, Innovation and Skills (BIS), in setting out its *Principles for Economic Regulation*, committed to ensure that regulators' objectives were clear and appropriately prioritized, and to take 'opportunities to simplify and clarify regulators' objectives'.[95] Furthermore, it recognized the need for 'a clear division of responsibilities' between government and regulators:

> [M]aking politically sensitive trade-offs between objectives is likely to require democratic legitimacy and accountability and is clearly the role of Government. Government should not avoid making these difficult policy decisions or pass them to regulators to determine.[96]

The DECC made similar points in its *Ofgem Review* of 2011,[97] conceding that the use of guidance and amending the statutory duties had 'not succeeded in consistently and transparently achieving the desired coherence between the overarching strategy and the regulatory regime'.[98] This 'disconnect' was attributable to both 'the broad scope of the duties and the weak legal status of the Guidance',[99] which had in many cases become outdated.[100] The *Review* considered a number

[92] House of Lords Select Committee on the Constitution, *The Regulatory State: Ensuring Its Accountability* (2004) HL Paper 68-I, para. 101, at <https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/68.pdf>.

[93] House of Lords Select Committee on Regulators, op. cit., n. 9, para. 5.49. For a similar view, see C. D. Foster, *Privatisation, Public Ownership and the Regulation of Natural Monopoly* (1992) 205.

[94] The previous Government was of the view that there was little confusion over the duties: Department for Business, Enterprise & Regulatory Reform, *Government Response to UK Economic Regulators Report* (2008).

[95] Department of Business, Innovation and Skills, *Principles for Economic Regulation* (2011) 11, at <https://www.gov.uk/government/publications/principles-for-economic-regulation>.

[96] Id., para. 18.

[97] Department of Energy and Climate Change, *Ofgem Review: Final Report* (2011), at <https://www.gov.uk/government/publications/ofgem-review-final-report>.

[98] Id., para. 77.

[99] Id., para. 78.

[100] Id., para. 79.

of possible solutions. The first was to strip back the statutory duties and focus solely on economic regulation.[101] This option was rejected. Public interest goals would remain, though this left open the question of who should make trade-offs between different interests; while government was to make trade-offs at the strategic level 'where the general interests of citizens are at stake', consistent with this, 'Ofgem should consider trade-offs between economic and broader goals in all its decision making'.[102]

The solution was to strengthen government guidance, styled as the 'Strategy and Policy Statement' (SPS), which would define with greater clarity government's strategic goals, the respective roles and responsibilities of it and the regulator, and the specific policy outcomes that Ofgem should achieve.[103] While government would retain the option of amending the statutory duties, the enhanced guidance would make changes 'less likely'.[104]

In its energy market investigation, the CMA criticized the statutory duties, especially the 'downrating' of Ofgem's competition duty under the Energy Act 2010 (discussed above), which had resulted in a 'lack of clarity' and had 'increased the likelihood' of it taking decisions that were not in the best interest of consumers.[105] Furthermore, it had created 'some confusion as to a conflict' between competition and consumer protection,[106] causing Ofgem 'to carry out inefficient trade-offs' and leading to decisions that had an adverse effect on competition.[107] The CMA recommended that Ofgem's duties were in need of clarification.[108] It is interesting to note that, exceptionally, the then Government did not implement this recommendation.[109]

The statutory duties of regulators have long generated a level of controversy and tensions in regulatory decision making. The role of economic regulators is often conceived narrowly as merely regulating monopolies, correcting market failures, and promoting competition where that is possible. Regulation is perceived as a 'technocratic' exercise, comprising complex accounting and economic questions, rather than as scrutiny of more subjective and open-ended issues over, for example, the weight to be given to the interests of different consumers. Little wonder, perhaps, that there is an understanding within the regulatory community that interventions are always second best to market outcomes and should be limited to, in Littlechild's emblematic phrase, 'holding the fort until competition comes'.[110]

[101] Id., para. 82. An alternative was to broaden the duties, expanding the remit of the regulator to include the interests of citizens, not merely the consumers of gas and electricity.

[102] Id., para. 83.

[103] Id., para. 86. The SPS model was originally envisaged in the BIS report: Department of Business, Innovation and Skills, op. cit., n. 95, pp. 10–11.

[104] Id., para. 90.

[105] CMA, op. cit., n. 4, paras 18.9–18.28.

[106] Id., para. 18.22.

[107] Id., para. 18.27. Namely, these decisions were the imposition of a non-discrimination clause on suppliers followed by a cap on the number of tariffs. For an overview, see C. Crampes and M. Laffont, 'Retail Price Regulation in the British Energy Industry' (2016) 17 *Competition and Regulation in Network Industries* 204; M. Hviid and C. Waddams, 'Non-Discrimination Clauses in the Retail Energy Sector' (2012) 122 *The Economic J.* F236.

[108] Id., para. 18.28.

[109] Department for Business, Energy & Industrial Strategy, *Government Response to the CMA Energy Market Investigation* (2018) 3, 7, at <https://www.gov.uk/government/publications/cma-energy-market-investigation-government-response>.

[110] S. Littlechild, *Regulation of British Telecommunications' Profitability* (1983) para. 4.11.

Of particular concern is the question of *democratic* legitimacy, and how the regulator frames its discretion when it comes to decisions that have significant redistributive effects.[111] There is a conundrum that has long vexed the regulators. On the one hand, they are 'creatures of statute', and where broader social goals are included by Parliament within the statutory objectives, their pursuance can be justified democratically.[112] On the other, they are neither elected nor directly accountable. The statutory duties, which need translation into policy, 'rarely provide an easy answer to questions of legitimisation'.[113]

One potential solution to an apparent legitimacy deficit may be found in 'proceduralization'.[114] Over time, the perceived lack of democratic accountability has led to a greater reliance upon procedural norms, such as the increased use of consultation processes and broader engagement with consumers and regulatees.[115] The introduction of regulatory boards in the early 2000s was also a means of accommodating a greater plurality of viewpoints in decision making.[116] Another significant change has been the increased use of parliamentary oversight, especially through specialist select committees.[117] In 2004, the regulator's duties were augmented to include a requirement that regulation was consistent with the principles of 'best regulatory practice' including transparency, accountability, proportionality, and consistency.[118] Taken together, these developments have underscored the increased importance of dialogue both within the organization and with external actors.[119]

Nevertheless, the question of resolving conflicts between duties is by no means straightforward.[120] Indeed, it may be that resorting to trade-offs between those objectives that are not comparable is an inherently flawed approach.[121] Organizations may develop various strategies for weighing different values, or perhaps ignoring some of them, where they are incommensurable.[122] There

[111] Legitimacy is not limited to democratic claims. For reasons of space, it is not possible here to elaborate upon the various notions of legitimacy pertinent to regulation, which may include functional and procedural dimensions, as well as claims of superior expertise. For a fuller discussion, see J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137; F. Vibert, *The Rise of the Unelected : Democracy and the New Separation of Powers* (2007) ch. 8.

[112] For an example of this view from the first CEO of Ofgem, see C. McCarthy, 'The Independence of the Regulation Authority: Why Independent Regulators?' (2003) Sciences-Po, Paris, 6.

[113] Baldwin et al., op. cit., n. 51, p. 28.

[114] J. Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford J. of Legal Studies* 597. For a discussion in this context, see Graham, op. cit., n. 18, pp. 67–68; Prosser, op. cit., n. 20, pp. 196–200.

[115] C. Scott, 'Accountability in the Regulatory State' (2000) 27 *J. of Law and Society* 38.

[116] However, it was never intended that these boards would represent different interest groups: Prosser, op. cit., n. 20, p. 197.

[117] On democratic oversight of the regulators, see D. Oliver, 'Regulation, Democracy, and Democratic Oversight in the UK' in eds Oliver et al., op. cit., n. 2, p. 243.

[118] Energy Act 2004, s. 178.

[119] On the latter, see J. Black, 'Talking about Regulation' [1998] *Public Law* 77.

[120] For a detailed discussion, see C. R. Sunstein, 'Incommensurability and Valuation in Law' (1994) 92 *Michigan Law Rev.* 779; R. Stewart, 'Regulation in a Liberal State: The Role of Non-Commodity Values' (1983) 92 *Yale Law J.* 1537.

[121] In the regulatory context, much of the controversy in this regard concerns the use of regulatory impact assessments (RIAs). Ofgem is under a duty to conduct a RIA in relation to any 'important' proposal that it makes: Utilities Act 2000, s. 5A (as inserted by Sustainable Energy Act 2003, s. 6). For a detailed discussion, see Prosser, op. cit., n. 20, pp. 214–220. On the approach of the regulator, see Ofgem, *Impact Assessment Guidance* (2020), at <https://www.ofgem.gov.uk/publications/impact-assessment-guidance>.

[122] D. Thacher and M. Rein, 'Managing Value Conflict in Public Policy' (2004) 17 *Governance* 457; Prosser, id., p. 218.

is the attendant danger that regulators will suffer from a 'dangerous myopia' unless they recognize the political context in which they operate.[123] It has been suggested that developing and enhancing deliberative procedures and decision making could provide a solution to the reconciliation of conflicting values.[124]

What is clear is that the legislation does not, and has never, limited the regulatory remit to economic questions only. The original mandate has been described as 'vague and unspecified', particularly with regard to the promotion of competition.[125] As Graham observed, writing towards the end of our first phase of the statutory objectives, '[w]hat the legislation really does is to set out a series of factors which pull in different directions'.[126] Similarly, as Prosser opined, the original regulatory goals were 'mixed and include[d] irretrievably varied rationales, economic and social'.[127] With the changes made to the legislation over the course of the last three decades, an increased emphasis has been placed on social and environmental issues.[128] The duties certainly have not become simpler, and the idea that regulation would 'wither away' has been replaced by an *increased* 'political' dimension to regulation, especially concerning environmental objectives.[129]

4 | INTERVIEW ANALYSIS: THE VIEW FROM WITHIN THE REGULATORY COMMUNITY

We turn now to the interview data, beginning with a brief note on the methodology used.[130]

In total, we conducted in-depth, semi-structured interviews with 13 elite participants who – in lieu of full anonymization – have each been assigned an agreed description for contextual purposes.[131] The candidates for interviews were selected on the basis of 'purposive sampling'[132] – that is, they were identified as key individuals likely to provide highly salient information and perspectives given their seniority and expansive level of experience. Following a period of archival research, we compiled a longlist of potential interviewees with the relevant knowledge and background.[133] From that list, those who agreed to participate were in the main current or former executive and senior non-executive members of the regulator, or leading experts in the field of energy regulation. While small in size, the sample is representative insofar as it captures 'the range or variation in a phenomenon' – that is, the role of statutory objectives in steering regulatory policy.[134] There is also a longitudinal dimension to our analysis, in that we selected different

[123] A. Eriksen, 'Political Values in Independent Agencies' (2021) 15 *Regulation & Governance* 785, at 787–788.

[124] Prosser, op. cit., n. 20, p. 18, p. 218.

[125] D. Helm, *Energy, the State, and the Market: British Energy Policy since 1979* (2003) 120.

[126] Graham, op. cit., n. 18, p. 32. This observation is not limited to energy regulation.

[127] Prosser, op. cit., n. 38, p. 24.

[128] Graham, op. cit., n. 26; see also Prosser, op. cit., n. 20, ch. 9.

[129] Baldwin et al., op. cit., n. 51, p. 10.

[130] For a detailed discussion, on which we draw, see L. Webley, 'Qualitative Approaches to Empirical Legal Research' in *The Oxford Handbook of Empirical Legal Research*, eds P. Cane and H. M. Kritzer (2010) 926.

[131] Interviews were conducted via face-to-face and telephone meetings, and participants were given the opportunity to amend their anonymized transcripts.

[132] M. Q. Patton, *Qualitative Research and Evaluation Methods* (2002) 45; Webley, op. cit., n. 130, p. 934.

[133] Our efforts to secure interviews with current and former politicians and ministers proved unsuccessful.

[134] Webley, op. cit., n. 130, p. 934. Obviously, such an approach does not permit 'the estimation of the distribution of the phenomenon in the population as a whole': id.

interviewees who collectively have experience over the lifetime of the statutory objectives (the three phases outlined in Figure 1).

The technique for analysing the interview data is commonly referred to as the 'grounded theory method'. The interviews were guided by a series of open-ended questions, touching on a number of inter-related issues including: how the structure and content of statutory objectives affects decision making; the causes of complexity; whether there is any need for a simplification; external influences upon statutory interpretation; and techniques and mechanisms that the agency employs to structure its duties, ensuring that its priorities are understood consistently within the organization. Interview transcripts were first read and re-read, coded, and then organized around emergent themes and conclusions.[135] This process may be described as inductive, seeking to draw out concepts and theories from the interview data in a structured and considered fashion.[136] Illustrative quotes have been used to add credibility to the claims being made, and also to supply context and reveal nuances that may have escaped the synthesis of the data offered by the authors.

4.1 | Complexity and coherence of decision making

We have already noted the increasing complexity of the statutory duties, both in number and the hierarchy of priorities for the regulator. In order to illustrate this to our interviewees, we presented them with a diagram charting the development of the duties over time.[137]

As a number of our interviewees observed, it is reasonable to expect the regulator's objectives to evolve with the complexities of this market and new technologies.[138] Statutory duties may change in accordance with government policy, this being especially the case with environmental issues and decarbonization objectives.[139] Despite these changes, however, there were doubts about whether this has necessarily constituted a shift in the nature of regulation. As one participant, with experience as an executive member of Ofgem's board, observed when comparing earlier and later versions of the duties:

> The … thing that really is surprising to me is that all the duties are more or less encapsulated in the [early legislation]. I think they, basically, are expanding upon those duties. And therefore I could … comfortably live with the present statutory duties … and undertake what I thought was good economic regulation.[140]

Reflecting on why the duties have proliferated, another interviewee commented:

> Whenever legislation occurs, there's often a sense that whatever the legislative aim … , the regulator should be (in some sense) facilitating that aim. … So I think that as

[135] J. Fereday et al., 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 *International J. of Qualitative Methods* 1.

[136] Webley, op. cit., n. 130, p. 945; A. Seal, 'Thematic Analysis' in *Researching Social Life*, eds N. Gilbert et al. (2016) 443.

[137] This was based on Figure 1 above.

[138] Interviewees 1, 2, and 7.

[139] Interviewees 1, 3, 7, 8, and 13.

[140] Interviewee 13.

> legislation occurs (and there's been a fair amount of legislation), [Ofgem] were given extra duties almost naturally as a result.[141]

Similarly, another participant noted that some duties merely get replicated across all regulators.[142]

What were particularly interesting were the reflections of some of our participants upon the motivations of politicians in legislating to add to the duties. For example, one interviewee with experience as a panel member of the competition authority observed:

> I'm a bit tempted to cut through this a bit and say that, look, politicians are always trying to protect themselves in one way or another (and civil servants too). So there will always be a whole plethora of obligations.[143]

In a similar vein, another participant commented:

> [I]t's what people call 'virtue signalling'. You introduce a policy, not so much because you think it's going to do good, but because it will signal that you're a terribly virtuous organization. And I think there's a lot of that in what the government has done in terms of climate change legislation. … I don't think that the government has done it other than to try to garner votes for doing what it thinks the populace might think is the right thing.[144]

Similarly, another interviewee thought that the addition of duties has happened merely because it is an 'easy' option for government.[145]

In terms of substantive content, one interviewee was of the view that the increasing array of duties reflects the changing nature of governments' philosophical attitude towards regulation and of its goals:

> [T]he original duties were written with a view to a particular purpose – namely, privatizing companies and their subsequent regulation, and written by a government that had really very limited interest in doing anything other than making this a competitive market. … What happened then, during the subsequent two decades, was that governments came in that wanted to do more and wanted to intervene more. Competition was important but not by any means the only or the main aim.[146]

Furthermore, as one participant noted, increasing competition has resulted in more complexity in the interpretation of duties.[147] Another interviewee, with experience as an executive member of the Ofgem board, was less sanguine, arguing that the frequency of changes was without

[141] Interviewee 7.

[142] Interviewee 5.

[143] Interviewee 3. Similar remarks were made by Interviewees 1 and 11.

[144] Interviewee 10.

[145] Interviewee 9.

[146] Interviewee 12.

[147] Interviewee 13.

justification: '[I]f government didn't like what you were doing, it would use the *threat* of changing your duties to get what it wanted.'[148]

One interviewee observed that, while government lawyers put a lot of thought into the drafting of the original duties in a precise and clear way, in contrast, 'I think they've been very sloppy since then …, they haven't given it the same level of thought'.[149] Reflecting on the original set of objectives, this participant claimed that it was possible for a regulator to know 'instinctively' whether a decision was consistent with them.[150]

A number of interviewees did point to some of the problems with increasing the list of objectives in terms of decision making. As one participant put it:

> [T]he current view is … it's very hard to look at it and not say 'What on earth are we being asked to do?' And I think the more you give a Board a very long, and complicated, and conflicting set of duties, the more you just get room for inconsistent decision making.[151]

As statutory duties proliferate, there tends to be 'sharpening-up of some of the conflicts they create'.[152]

One participant pointed to the fact that the range of objectives includes some that are less relevant to the regulator than to government.[153] There was also the view that the duties now tend to obscure the clear division of responsibilities between government (for distributional issues) and the regulator (for efficiency and promoting competition).[154] Another interviewee was more equivocal:

> I feel that the level of complexity is higher than it should be and I think a review of it would make sense. I am not sure that it is a significant impediment on decisions. And maybe I'm wrong in that, but I'm not sure that it [is]. Because, as I said, we felt the principal objective gave us a degree of clarity in that regard.[155]

A further apparent source of frustration was the addition of duties without any corresponding powers. Giving a concrete example, one participant reflected:

> Sustainable development … is a massive and very difficult and very important objective … . Ofgem has some powers that reflect on sustainable development but it's not the body that can lead on that. If you think of it in terms of work with other bodies … then, of course, that becomes more plausible.[156]

[148] Interviewee 11, emphasis added.

[149] Interviewee 9.

[150] Id.

[151] Interviewee 11.

[152] Id.

[153] Interviewee 1.

[154] Interviewees 13 and 3. It should be noted that the duties are addressed to both the regulator and the Secretary of State.

[155] Interviewee 7.

[156] Interviewee 1.

Other interviewees were more emphatic, with one reflecting that the increasing priority given to environmental issues 'but without commensurate powers … creates a fault line'.[157] Indeed, there were apparent tensions within the regulator on how it should respond to new duties on reducing emissions, with one 'camp' accepting the right of Parliament to impose any duties that it chooses to, and another arguing that it is necessary to resist being 'set up to fail'.[158]

One participant, with experience as a senior member of the regulator, characterized the problem as one of sequencing, arguing that the most pertinent task is to define the regulator's powers, then to frame the duties to guide it on how to use them.[159] This was the approach of those who framed the original legislation.[160] Another interviewee gave an example where the objectives had been used by the regulator to secure greater powers.[161] Another participant pointed to an instance where changes to the duties – in this case, the Gas Act 1995 with a primary duty to promote competition – were accompanied by significant powers to separate the then vertically integrated incumbent, British Gas.[162]

Given that some increase in complexity is the natural result of the changing nature of government policy and shifts in the structure of the market (partly as a result of the introduction of competition), we were keen to interrogate the issue of whether there is an 'optimal' number of objectives. This resonated with a number of our interviewees. One, with experience as a partner at Ofgem, observed that 'in some ways, complex systems require *simple* rules – and require simple heuristics and approaches'.[163] Conversely, complex duties may diminish the focus of the organization.[164] Similarly, another participant noted the problems of increasing complexity; the original duties rarely conflicted with each other, whereas they are now 'very messy', 'less useful', and harder for the regulator to implement.[165] Another interviewee thought that

> it is ridiculous to give any organization (or a person) more than *three or four priorities*. … [I]t just gets quite impossible if you have more than a small number. You can't concentrate on them; you can't lead an organization sensibly if it's got multiple objectives and multiple duties and multiple priorities.[166]

Nevertheless, the same interviewee did note that some duties are more significant than others and can prompt changes in regulatory policy (or added levels of political accountability), whereas others are meaningless and can be dismissed.[167]

If, then, the duties appear to be too complex, or sub-optimal, what are the possible causes, and what deters simplification? One of the potential explanations is the potential 'bad press' or

[157] Interviewee 11.

[158] Id.

[159] Interviewee 12.

[160] Id.

[161] Interviewee 2.

[162] Interviewee 14. On the relevant background to this legislation, see Prosser, op. cit., n. 38, pp. 104–106.

[163] Interviewee 1, emphasis added.

[164] Id.

[165] Interviewee 9.

[166] Interviewee 5, emphasis added.

[167] Id.

backlash that may result from attempts to remove specific duties. As one interviewee observed, all of the duties appear 'sensible in isolation', so in any attempt to remove a duty to

> improve the strategic focus of the organization … you're going to have groups saying, 'Well, why do you want to get rid of this thing, which is a good thing?' I think it is quite difficult for the government to be in that space.[168]

Another participant made the point a little more pithily, reflecting on some of the difficulties facing a government seeking to get legislation through Parliament:

> [I]t's very difficult to get legislation through if you're removing a duty that other people regard as important. So you end up with this bloody great Christmas tree of duties and regulations. And you can understand why it happened: …it's the political process, for all its faults.[169]

This may, in part, explain why the objectives have never been simplified, despite the Coalition Government committing to do so in 2011.

4.2 | How do the statutory duties structure decision making in practice?

We now turn to the practical question of how the statutory duties structure the decision-making processes of the regulator, and measures that it has taken internally to fashion its objectives in a way that reduces the potential for inconsistent policy.

4.2.1 | The principal objective: a 'lodestone'?

One of the clear conclusions emerging from our study is the importance of the principal objective, likened to a 'lodestone' for the organization.[170] As one interviewee put it:

> the principal statutory duty of protecting the interests of current and future consumers is absolutely front and centre all the time. … And certainly lots of discussions are framed around, 'How is this decision affecting the achievement of that principal statutory duty?'[171]

Similarly, another participant lauded the clarity that it brings to decision making, at least in theory:

> [I]t negates some of the confusion or potential (and I stress, potential) conflict that might occur with the other duties. And it is, in some sense, the guiding principle,

[168] Interviewee 1.

[169] Interviewee 5.

[170] Interviewee 7.

[171] Interviewee 1.

> I would say, that the Board of the Authority relies on when making primary decisions.[172]

The principal objective also enables the organization to communicate its priorities to external stakeholders.[173]

Another interviewee, while expressing support for the introduction of the principal objective, argued that, in practice, it has changed little given that ensuring that firms can finance their activities and securing supply are 'part and parcel of protecting consumers' and 'not conflicting duties'.[174]

4.2.2 | 'Downrating' of competition and its effects

Despite the findings of the CMA, the interviewees who commented on the Energy Act 2010 amendment (explained above) thought that, in practice, it had not had a significant effect on substantive outcomes. One participant stated that given Ofgem's role as 'a competition-focused regulator', the revised duty has not led to decisions that run contrary to that rationale (giving the example of Ofgem's rejection of a full residential price cap).[175] Asked whether the 2010 amendment may have driven sub-optimal decisions on the part of Ofgem (the view of the CMA), one interviewee explained that 'it's not purely the duties that drive that, it is the wider context'.[176] The change merely introduced an additional 'procedural step'.[177]

It appears, then, that the so-called 'downrating' of competition has had little effect in practice, but it does have symbolic value, and may have created confusion, real and perceived. The CMA's recommendation was clearly prompted by Ofgem's concerns in these respects, although the regulator did have an interest in pursuing this line as a means of deflecting criticism of some of its policies.[178]

Interestingly, one of the reasons why the amendment has had, in the view of several interviewees, such little effect on the status quo in practice is the principal objective that the Board 'bought into'.[179] Indeed, as one participant opined, the amendment may have been based on a misunderstanding of the precise wording of the provision – that is, it requires the promotion of competition 'wherever appropriate' and not 'wherever possible', which has 'quite a different emphasis'.[180] Another participant, however, thought that the change has not had an effect because the regulator is no longer 'favourably inclined towards competition in the way that the early regulators were'.[181] Nevertheless, one interviewee did speak in favour of the change of direction towards

[172] Interviewee 7.

[173] Id.

[174] Interviewee 13.

[175] Interviewee 7.

[176] Interviewee 8.

[177] Id.

[178] CMA, op. cit., n. 4, para. 18.15.

[179] Interviewee 7.

[180] Interviewee 8.

[181] Interviewee 10.

consumer protection insofar as it prompts the question 'You're promoting competition to what end?'[182]

4.2.3 | Conflict between the statutory duties and making trade-offs between them

We were interested to learn more about how decisions are made within the organization, especially those that require the balancing of conflicting duties. One participant noted that, as one would expect of an economic regulator, 'Ofgem would rely where it can on quantified measures' in making any trade-offs.[183] Another interviewee observed that the role of Ofgem is to 'lay out the possible options open to the regulator, with GEMA as the decision-making authority' making judgements over prioritization and trade-offs; the role for Ofgem is to ensure decisions are made in a well-informed way.[184] However, this interviewee added, 'in practice, quite often there are no trade-offs really; there's a more sensible and a less sensible decision'.[185] As one participant recalled, where trade-offs were made between objectives

> in any of the senior discussions I was participating in, we really did come back to the question of 'Is this the right thing by the consumer?' and 'Is it proportionate on industry?' That's really the basic question we asked ourselves: 'Is it proportionate?'[186]

Another interviewee explained how 'the Board' (the informal name for GEMA) would deal with trade-offs. A paper would be provided that would explicitly 'try and engage duties' and expose tensions:

> I think there was always healthy debate and certainly don't think [the Board] suffered from 'group think'. [Healthy debate] was understood and encouraged, and there were lots of big issues where we took a couple of goes as a Board to get to a decision. I think this was a good discipline.[187]

Nevertheless, in the view of this participant, there were occasions where mistakes were made, despite expert and external voices advising against them.[188]

A number of interviewees keenly explained that the earlier, simpler framework for statutory duties gave more clarity. One participant explained that, at this time, making explicit trade-offs between different groups of consumers was rare; if there was a choice between two alternatives for the regulator, the one that was best for consumers *as a whole* would be chosen.[189] Another

[182] Interviewee 2.

[183] Interviewee 8.

[184] Interviewee 1.

[185] Id.

[186] Interviewee 2.

[187] Interviewee 11.

[188] Id.

[189] Interviewee 13.

interviewee, reflecting on early decisions over liberalization, did not think that the balancing of statutory duties played a major role in decision making:

> [T]here were a lot of issues to consider as to what the regulator actually did; what would be the best way to achieve something; how to balance political pressures of one kind or another. There were a whole range of issues that may always be complicated but I don't sense that agonizing about the weighting of the statutory duties played any significant role.[190]

Reflecting on the same period, another participant was of a similar view, arguing that the original duties were simply not in conflict.[191] This did appear to change with the evolution of the statutory duties, although another explanation may be the existence of a board structure rather than an individual regulator, leading to greater deliberation on the meaning of the duties and resolving conflicts between them.

4.3 | External mechanisms guiding the interpretation of the statutory duties

Clearly, statutory duties cannot be interpreted in a vacuum and external influences will guide the agency's approach. This section considers various such influences, including changes to the duties, or threats thereof.

4.3.1 | Government steering regulatory policy by amending the statutory duties

Another theme that we explored with our participants was the extent to which changing statutory duties is used by government as a means of exerting influence over the regulator, particularly where there exist irreconcilable policy differences. There is, in the view of a number of interviewees, nothing objectionable about amending legislation to guide regulatory policy. One participant thought that using legislation is 'meaningful', setting appropriate boundaries between government and the regulator.[192] Another interviewee, with experience both within the regulator and Whitehall, explained the situation more pragmatically:

> I'm sure [politicians] are interested in claiming the credit. They've got to do something and they don't always have levers to do things themselves. I mean, arguably, changing the statutory duties is what they're meant to do. If they want Ofgem to behave in a different way, then the right way to do that is through the legislative process, rather than strong arming behind closed doors.[193]

[190] Interviewee 12.

[191] Interviewee 9.

[192] Interviewee 2.

[193] Interviewee 8.

Several interviewees thought that the statutory duties give the regulator 'a degree of independence' and can be used defensively against attempts by ministers to put pressure on it.[194] However, one participant had a contrasting view, arguing that government amends duties in order to 'gain leverage' over the regulator and regulatory policy.[195] Another interviewee agreed, noting that government would use the *threat* of changing duties as a means to influence the regulator and its policies.[196] One interviewee gave the example of the environmental duties, which were inserted in order to resolve a difference of opinion between the regulator and ministers:

> Partly, the successive changes through the Energy Acts in the mid- to late 2000s were really about the conflict between Ofgem and government – against the background of government not wanting to be seen to be instructing Ofgem on what to do. And so, basically, Ofgem's line was, 'Look … our statutory obligations are primarily to consumers; consumers are primarily interested in low prices; you're telling us to install a load of expensive renewables and that's clearly in conflict with our obligations.'[197]

Changing the duties do have consequences for the regulator:

> Parliament has the right to legislate as it sees fit. I think that the difficulty within that is the natural human psychology of thinking, 'Well, if the government legislates, does that mean that we have gone wrong, or failed in some fashion?' And I think regulators need to be, as far as practical, not influenced by that – but I think it's difficult.[198]

There appears to be some debate over the extent to which this is legitimate, which most probably depends upon how one views the appropriate contours of the regulator's autonomy vis-à-vis government and legislature. Perhaps this question is bound up with the nature of the duties imposed and the policy objectives pursued. One interviewee, with experience as a senior member of the regulator, claimed that it is inappropriate for duties to be imposed that require Ofgem, as an unelected body, to take decisions of a political nature.[199] Another participant argued that the regularity of small incremental changes to the duties represented a serious problem for the credibility of the regulator:

> [I]f you go back to first principles and what we were trying to do, part of the problem we were trying to solve in all the privatizations was ministerial whim, short-termism in industries that needed long-term stability to invest and thrive. … So, just looking [at the duties], that says to me that we spectacularly failed because we've just replaced ministerial whim and decision making by hyperactive changing of duties.[200]

[194] Interviewees 3, 5, and 9.

[195] Interviewee 1.

[196] Interviewee 11.

[197] Interviewee 3.

[198] Interviewee 7.

[199] Interviewee 9.

[200] Interviewee 11.

4.3.2 | The use of government guidance

While changing the duties is a means of influencing the regulator, there are nevertheless inherent ambiguities and trade-offs within them. Adding to the duties may merely amplify the potential for conflicts between them. The central trade-offs in energy policy – the trilemma – pose the most difficult question for the regulator, as one interviewee explained:

> Clearly, different governments of different hues effectively have different priorities within the trilemma. And that is clearly an area where the obligations are unclear; how is Ofgem meant to trade-off the three elements of the trilemma, let alone some of the subsidiary obligations?[201]

Most of our interviewees envisaged a role for government here. As one observed:

> I think it probably is the role for government to say what are the trade-offs between affordability, carbon reduction, security of supply, at that level. That ought to be the responsibility of elected politicians. I think where it gets more difficult is if it turns into prioritizing particular technologies or particular projects, which I think Ofgem wouldn't want.[202]

Indeed, in line with the BIS and DECC reports (discussed above), one participant thought that guidance has the potential to play an important role, removing the need to adjust the duties via legislation:

> Changing the statute every Parliament …, based on government priorities, looks an odd approach. Clearly, if you had a long-term cross-party consensus that the regulatory framework needs to change, that's the kind of situation where you might think changing the statutory duties is a more appropriate way. There is a halfway house, which is … where the government issues a Strategic and Policy Statement.[203]

Another interviewee argued more positively that 'government has to give a clear policy steer', without which there is the danger that regulators 'tend to do all kinds of bizarre things'.[204]

While there may be an acceptance of the need for government to set priorities through guidance, a number of problems exist in practice. One issue relates to the weight that the regulator ought to attach to guidance; while it clearly cannot be ignored, at the same time it does not override statutory duties, and it is important that the guidance does not change 'too often'.[205] The use of guidance dates back to the Utilities Act 2000, with further changes made to the power under the Energy Act 2013. The iterations of the Social and Environmental Guidance (SEG) were criticized as being vague, specifically failing to articulate government's priorities. For example, the House of Lords Select Committee on Regulators underlined the need for the executive to be 'explicit

[201] Interviewee 3.

[202] Interviewee 8.

[203] Interviewee 1.

[204] Interviewee 4.

[205] Interviewee 1.

in the political decisions it makes and in the consequent guidance it issues to regulators'.[206] The original SEG was criticized by our interviewees for its failure to effectively communicate priorities. As one explained, 'I think Ofgem hoped that that would be a way for government to articulate where it saw the lowest priority, but it just became a very, very long shopping list of all the things government would like.'[207] Another participant referred to it as 'just waffle'.[208]

As was noted above, the Coalition Government did attempt to strengthen government guidance with the use of the SPS, although that power remains dormant.[209] There were various views among our interviewees on why this may be so. As one put it, the failure to give the regulator a clear policy steer is in part because 'government ministers hate being nailed down'.[210] Another interviewee explained that while regulators want clarity over objectives, politicians want and need flexibility to respond to changing circumstances (such as increasing prices).[211] Furthermore, politicians also want to be able to shift the blame for unpopular policies:

> [P]oliticians don't want to be *seen* to be taking the blame. They want to be able to blame the regulator. And so you've got that fundamental conflict between the government wanting to do stuff, and [wanting] the regulator to do stuff, but at the same time not wanting to take the blame for unpopular stuff.[212]

The potential danger in all of this is that politicians will still want to influence the regulator by less formal mechanisms.[213] The use of strategic guidance has fared better in other sectors. In water, government has used its analogous power under the Water Act 2014.[214] In addition, it also sets guiding principles for water resource management, although in this context it has also been criticized for failing to give both the regulator and the water companies a sufficient steer on how to balance investment and affordability.[215] For railways, a more prescriptive model exists, reflecting in part the quantity of public subsidy that operators receive.[216] The level of control exerted by the Department of Transport over the industry, including setting regulated fares, may blur the division of functions between it and the regulator.[217]

[206] House of Lords Select Committee on Regulators, op. cit., n. 9, para. 6.50.

[207] Interviewee 8.

[208] Interviewee 5.

[209] Energy Act 2013, s. 131. While a draft SPS was issued and consulted upon by the DECC in August 2014, it has yet to be designated: DECC, *Strategy and Policy Statement* (2014), at <https://www.gov.uk/government/consultations/strategy-and-policy-statement>.

[210] Interviewee 4.

[211] Interviewee 3.

[212] Id., emphasis added.

[213] Interviewee 8.

[214] Water Act 2014, s. 24. See Defra, *The Government's Strategic Priorities and Objectives for Ofwat* (2017), at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661803/sps-ofwat-2017.pdf>.

[215] National Audit Office, *Water Supply and Demand Management* (2020) HC 107, at <https://www.nao.org.uk/wp-content/uploads/2020/03/Water-supply-and-demand-management.pdf>.

[216] Prosser, op. cit., n. 20, pp. 182–183. In addition to guidance issued to the regulator (under Railways Act 1993, s. 4(5)(a) (as amended)), government also issues its 'High Level Output Specifications' alongside a statement of the public funding made available to operators: Railways Act 2005, sch. 4; Department of Transport, *Railways Act 2005 Statement: High Level Output Specification 2017* (2017), at <https://www.gov.uk/government/publications/high-level-output-specification-2017>.

[217] House of Lords Select Committee on Regulators, op. cit., n. 9, para. 6.52.

4.3.3 | The threat of legal challenge

While not the central focus of this article, it is clear that the courts, and the possibility of judicial review in particular, do influence the manner in which decisions are taken. Several of our interviewees discussed specific cases that were brought against the regulator during their tenure.[218]

From a procedural perspective, one participant explained that when 'big and difficult' decisions went to Board level, the accompanying papers would have been reviewed by the legal team, checking off core duties while highlighting 'lower-level duties' relevant to a specific project.[219] Another participant highlighted the need to ensure that the full list of duties had been considered by the regulator in reaching its decision; often, considerations that the regulator had thought were 'implicit' in its determinations gave stakeholders reasons to object to decisions that ran counter to their interests.[220] On the other hand, one interviewee was firmly of the view that increased complexity *reduces* the legal accountability of the regulator.[221]

Reflecting on the possible threat of judicial review, one interviewee thought that the statutory duties, and the relative weighting given to them, were not a central concern for the regulator: 'It hinged on whether the analysis of what a particular change in the licence would do, or what the value of that was, how it would hit some companies hard, and whether it was a reasonable thing to do.'[222] By contrast, another participant recollected how senior legal counsel, in the light of an anticipated judicial review, prepared a paper for the Board containing a 'decision tree', explaining how the different duties engaged with one another, and at what points in the decision-making process they needed to be considered; this subsequently became standard practice.[223] Another interviewee gave an example of how much deliberation went into the legal interpretation of duties, giving a specific example of the duty to promote energy efficiency:

> [D]id that duty have any economic content or was it a duty in its own right? … Eventually, with a lot of legal help and barristers, we came to the conclusion that actually it was a duty that did require some economic rationale, and it wasn't one that could entail us spending money for its own sake.[224]

The same participant actually lamented the dearth of judicial review cases, more of which could have clarified the interpretation of the duties.[225]

The statutory duties do appear integral to decision making within the regulator. One interviewee noted the extent to which members of the organization are familiar with the full ranking of duties (they are in 'people's bloodstreams'), with legal teams embedded in divisions working alongside project teams and, in the case of a change to the duties, a paper would be circulated explaining the implications.[226] Also, it was clear that the duties influence decisions at the top of

[218] We do not discuss specific cases raised in individual interviews as this may compromise anonymity.

[219] Interviewee 8.

[220] Interviewee 7.

[221] Interviewee 11.

[222] Interviewee 12.

[223] Interviewee 11.

[224] Interviewee 9.

[225] Id.

[226] Interviewee 8.

the organization: '[A]ny Board paper leading to a Board decision will have sections dealing with how it affects the specific duties.'[227]

4.4 | Internal mechanisms to aid interpretation

Another practical issue that we were keen to investigate was the extent to which the regulator seeks to clarify and understand its duties *internally*. One initiative is *Ofgem's Regulatory Stances*,[228] a document intended to provide greater clarity by distilling the aims and objectives to five clear statements of regulatory purpose. On the relationship with its statutory duties, the document states: 'These stances do not override Ofgem's statutory powers and duties. They are primarily an internal tool to give Ofgem policy-makers a framework for considering policy development.'[229] One interviewee explained the internal purpose of the communication in more detail:

> When a decision is being proposed, then the team proposing that decision has to say whether they've looked at the *Regulatory Stances*, whether the proposal is in line with [them], and if it's not, why not. So that's a decent part of how [the] duties – which are inevitably, even though there are lots of them, … still really high-level – … then [get] translated into action on the ground.[230]

Another of Ofgem's publications, its *Corporate Strategy*,[231] was also lauded as a means of articulating priorities and thereby improving transparency: '[T]he framing of the duties isn't enough – Ofgem has taken the interpretation that works best in terms of its understanding of what really is the aim behind these duties.'[232]

4.5 | Fairness and vulnerability: principle and pragmatism

One of the enduring controversies surrounding economic regulation has been the extent to which it is legitimate for a regulator to take decisions that have redistributive consequences for consumers.[233] While theories of economic regulation tend to focus on dealing with market failure and the control of monopoly power as the core regulatory rationale, as has already been observed, the regulator has since its inception had a broader public interest remit.

The issue of 'fairness' in energy markets has a long provenance, dating back to at least the Utilities Act 2000 and the underpinning Green Paper. The concept itself has several possible dimensions. The least controversial is fairness to consumers as a whole, ensuring that aggregate prices are not excessive. It could also mean procedural fairness, such as ensuring that terms and charges

[227] Interviewee 7.

[228] Ofgem, *Ofgem's Regulatory Stances* (2016), at <https://www.ofgem.gov.uk/publications-and-updates/ofgems-regulatory-stances>.

[229] Id., p. 3.

[230] Interviewee 1.

[231] Ofgem, *Corporate Strategy* (2014), at <https://www.ofgem.gov.uk/publications-and-updates/corporate-strategy>.

[232] Interviewee 2.

[233] Such decisions might include cross-subsidies between consumer groups, and in more recent years, restricting price discrimination between active consumers and those who remain on more expensive default tariffs.

are transparent. More contentious are limits on price differentials between customers, or measures that, in view of the essential nature of the product, result in one group of consumers cross-subsidizing another. According to *Ofgem's Regulatory Stances*, the regulator's role is to ensure that consumers are 'confident that they're getting a fair deal and that they will be treated well by their energy companies', and to achieve that primarily through competitive markets.[234] In addition, Ofgem notes: 'We may act to reduce the cost to vulnerable customers if we believe they are suffering an unfair disadvantage. But we also believe actions primarily intended to redistribute substantial costs are a matter for government.'[235]

The concept of 'fairness', and the extent to which it is relevant to the regulator, was contentious for our interviewees. The core question appears to be where to draw the line. As one participant explained, general issues of 'fairness in terms of protecting consumers' are relevant, but 'the big issues of distribution are issues for government'.[236] This participant explained the point further:

> The classic economist trade-off between efficiency and equity, the question of where you think we should be on that dial, where we should be on that trade-off, is a very difficult one … which is fundamentally, I think, a societal and a governmental one, rather than for Ofgem.[237]

Another interviewee took a different view, explaining that while there is a need to provide clarity on the correct delineation of responsibility between the regulator and government, issues of 'equity and justice are as much a matter for consumers and competition policy as they are for social policy'.[238]

By contrast, it was striking, especially given the statutory framework, how stridently some objected to the regulator being charged with issues of fairness and equity. Illustrating this point, one interviewee observed:

> I think regulators can deal with 'fairness' in the sense of the aggregate level of prices and profit … . But the distributional question of equity and fairness is really, really hard. … I don't feel I have any moral or *legal* right to do that.[239]

On this view, then, fairness is limited to the question of firms' profitability and the prices charged to consumers as a whole, not to questions of differential charging among them. Another participant was of the view that imposing costs on consumers in order to deal with policy objectives gives rise to questions of both principle and pragmatism; there comes a point at which 'the redistributional aspect is so significant that this goes beyond the regulatory authority and it becomes a matter for government', although historically there have been differing views between regulators on where to draw this line.[240] One interviewee made the point differently, arguing that decisions that impose costs on consumers should be taken by government directly; while the regulator may

[234] Ofgem, op. cit., n. 228, p. 1.

[235] Id., p. 8.

[236] Interviewee 1.

[237] Id.

[238] Interviewee 2.

[239] Interviewee 11, emphasis added.

[240] Interviewee 12.

be charged with the implementation of such programmes, there needs to be a clear delineation of responsibility for what are essentially 'tax and spend' decisions, with the danger that otherwise government 'will hide behind the regulator'.[241]

As we noted at the outset, as the duties of the regulator have evolved over time, the interests of vulnerable consumers have been given more relative weight in the hierarchy of duties, although they were present from the beginning. One interviewee explained that, with respect to the protection of vulnerable consumers, the regulator has 'a pretty strong remit' and it 'is taken very seriously'.[242] As another participant observed, the specific interests of vulnerable consumers have more salience now as prices have risen, whereas in the earlier days such issues would have been seen as a complication or distortion undermining the 'competition first' view of regulation.[243] Indeed, this seems underscored by the shift in Ofgem's policy towards price caps for vulnerable consumers. Following on from a recommendation by the CMA, a limited price cap was introduced in 2017 for customers on pre-payment meters who were paying some of the most expensive tariffs. In February 2018, the regulator went beyond this, implementing the 'safeguard tariff' for vulnerable consumers in receipt of the 'Warm Homes Discount' benefit.[244] Furthermore, in early 2018, Ofgem's then CEO publicly apologized to vulnerable consumers for not having intervened in this way earlier.[245]

In the view of one interviewee, the issue of consumer vulnerability is not fully captured by the statutory duties:

> I think the interesting thing is that the framing in our duties is more around examples of certain descriptions of people; if you're living in rural areas, or above a certain age group … . It doesn't quite capture vulnerability in the way that we went on to describe it in our strategy, which is that it's transient. It's not just age or a physical disability, it could be so many different things.[246]

Indeed, this participant argued that the organization has now recognized the need for a differentiated approach to consumers, acknowledging that it is impossible to develop a 'single strategy that works for everyone'.[247] Another interviewee also noted the need for targeted interventions to assist specific groups of consumers who require help, while at the same time accepting that some consumers are capable of engaging in the market but choose not to do so: '[M]arkets should work as well as possible in a general competitive sense, but you should have targeted help for those least able to deal with the competitive market.'[248]

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[241] Interviewee 9.

[242] Interviewee 1.

[243] Interviewee 7.

[244] Both of these caps have been merged with the default tariff cap introduced by way of primary legislation: Domestic Gas and Electricity (Tariff Cap) Act 2018. For a full explanation, see S. Hinson, *Energy Bills and Tariff Caps* (2020) HC Briefing Paper 8081, 15–18, at <https://researchbriefings.files.parliament.uk/documents/CBP-8081/CBP-8081.pdf>.

[245] House of Commons Business, Energy and Industrial Strategy Committee, *Oral Evidence: Pre-Legislative Scrutiny of the Draft Domestic Gas and Electricity (Tariff Cap) Bill* (2018) HC 517, Q338, 369–373, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/517/517.pdf>; A. Ward, 'Ofgem Apologies for Failing to Act Sooner on Energy Price Cap' *Financial Times*, 10 January 2018, at <https://www.ft.com/content/c8e03f96-f600-11e7-8715-e94187b3017e>.

[246] Interviewee 2.

[247] Id.

[248] Interviewee 3.

One participant explained that 'by subsidizing one customer by another, you can actually make vulnerable people worse off'.[249] Another interviewee argued against widening the concept of vulnerability to include broader issues of fairness and distribution:

> I think if you care about fairness and justice in markets, then those are largely questions of taxation and benefits – and transfers between consumer groups that are better dealt with in the political process. So, I think there was always a narrow view of 'vulnerability', which I think was a safe one, which was that, to the extent that people die if they don't have access to heating and light (and there are customers for whom being cut off and other things could cause real physical harm to them), that it was in that very narrow sense, initially, that vulnerable customers were in [the legislation].[250]

The role of protecting vulnerable consumers appears to be accepted, but the extent of that duty remains controversial, especially where this has significant redistributive consequences.

5 | CONCLUSION

This article has offered a unique insight into the role that statutory duties play in regulatory decision making, with reflections on how and why legislative objectives evolve in the way that they do. Duties very often present the regulator with choices, and some ambiguity in the regulator's statutory mandate may be desirable, not least because it enables the system to be more responsive to changing circumstances over time.[251]

There appear to be strong tendencies towards increased complexity, although the duties have never been limited to purely economic goals, even from the outset. The belief, expressed by the first CEO of Ofgem, that the passing of primary legislation to amend the duties creates 'a relatively immutable – certainly slowly changing – legal framework' does not now stand up to scrutiny.[252] As some of our interviewees observed, each time relevant legislation is passed, there is an inclination to include new duties, often without concomitant powers. Conversely, making the political case for the removal of duties is difficult, given the likely resistance from interest groups. The case for a rationalization needs to be articulated; mere exhortations in favour of clarification are unlikely to lead to reform.[253]

There is a strong case in favour of a simplification of the regulator's statutory objectives. As a number of our interviewees lamented, greater complexity increases the risk of inconsistent decision making, sharpens conflicts and trade-offs, and obscures the division of responsibility between

[249] Interviewee 13.

[250] Interviewee 11.

[251] Baldwin et al., op. cit., n. 51, pp. 27–28.

[252] McCarthy, op. cit., n. 112, p. 13.

[253] Proposals have been made to further expand upon the list of duties. The Government has consulted upon a new duty to promote innovation: HM Government, *Encouraging Innovation in Regulated Utilities: Consultation* (2018) para. 2.18, at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752041/encouraging_innovation_in_regulated_utilities.pdf>. The National Infrastructure Commission recommended strengthened duties on infrastructure and climate change: National Infrastructure Commission, *Strategic Investment and Public Confidence* (2019) 12, 34, 37, at <https://nic.org.uk/app/uploads/NIC-Strategic-Investment-Public-Confidence-October-2019.pdf>.

government and the regulator, while also diminishing the focus of the organization. Complex systems may require simple rules. To illustrate this point, it was claimed that the principal objective provides clarity within the organization and beyond, against the backdrop of a proliferation of subsidiary duties. However, the issue of rationalization needs to be decoupled from the debate over the scope of the duties, and whether or not they should include broader social and environmental goals. The liminal space between regulatory policy and politics is always likely to raise questions over accountability and legitimacy. Attempts at insulating economic regulators from politics is a 'fool's errand'. The more realistic approach is to accept and confront the legitimacy deficit, and to explore the options available to minimize it, consistent with the model of independent regulation.

There are broader normative questions brought into sharp focus by our interviewees. On the one hand, amending the duties was seen as an appropriate means of government (and Parliament) influencing regulatory policy, superior to alternative, perhaps clandestine modes of control. On the other, it was felt that frequent incremental changes to the duties possibly undermine the credibility of the regulator (and regulation). Furthermore, legislating for new duties does not necessarily communicate how the regulator should prioritize its objectives; it was generally considered that it is the role of government to guide the regulator on how to make trade-offs within the trilemma, and effective government guidance is important, having the collateral benefit of making changes to the duties less likely. Those opportunities to clarify trade-offs have not, however, been successfully exploited by governments over time, despite the powers being available. Recognizing the limitations of government guidelines, the National Infrastructure Commission recently recommended that the boards of regulators should be given the power to seek directions from government when considering policies that may have significant distributional consequences, putting forward a menu of feasible choices.[254] This novel solution would have the benefit of ensuring that ministers cannot escape policy decisions, while also protecting the regulator's independence and autonomy.[255]

As was explained by interviewees, statutory duties do structure decision making within the regulator across all levels of the organization. Legal teams are integrated within the organization. The regulator has re-articulated the duties and how they frame decision making in practical terms, mediating complexity.[256] Internal deliberation is a key feature in resolving conflicts between the statutory objectives when policy is determined, and offers the regulator a means by which it can 'legitimize' its role as an unelected body. This would be enhanced if the regulator was clearer about when and how it is making trade-offs between competing objectives.[257] On the other hand, the regulator faces a dilemma: if making political choices 'taints' its legitimacy, why would it have an incentive to reveal them?[258]

While the legislative context is clearly important, the role of statutory duties cannot be considered in isolation from the philosophical mores common to the policy environment in which

[254] National Infrastructure Commission, id., p. 17, pp. 59–60.

[255] Id., p. 60.

[256] This may be a source of increased legitimacy, particularly where there is consultation on the content of the agency's vision of its mandate: Baldwin et al., op. cit., n. 51, p. 32. See most recently Ofgem, *Our Strategic Narrative for 2019–23* (2019), at <https://www.ofgem.gov.uk/system/files/docs/2019/07/our-strategic-narrative-2019-23.pdf>.

[257] By analogy, Ofcom is required by statute to make a statement on how it has resolved a conflict between its duties to promote the interests of citizens and consumers: Communications Act 2003, s. 3(8–9).

[258] Eriksen, op. cit., n. 123, p. 788.

they operate. There was clear evidence of ideological objections to the content of the duties within this regulatory community. The core mission of the organization has shifted alongside the evolution of the statutory duties, with a greater emphasis given to consumer protection, in particular of those who are 'vulnerable'. There remains, though, a broad consensus that measures that have 'significant' redistributive consequences are matters for government rather than the regulator. Any study of how the statutory duties operate in practice has to acknowledge the powerful role that the internal norms of an organization have in framing legal discretion. Here we see a significant divergence between the statutory mandate and the regulatory community's perception of the appropriate limits of economic regulation. This could become a very serious fault line.

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